BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

TO: The Commission

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The Competitive Telecommunications Association ("CompTel") urges the Commission to adopt minimum cable open access rules to ensure that the cable modem platforms operated by incumbent cable systems are available to unaffiliated providers of telecommunications and information services for the provision of advanced services to cable subscribers. Based on its own Broadband Policy, CompTel has identified four fundamental principles that should form the basis of the rules adopted by the Commission.

- The rules should require incumbent operators of cable modem platforms to provide requesting providers with unbundled transmission capacity of sufficient bandwidth (including conditioning) for the provision of the telecommunications and information services they seek to offer.

- The incumbent cable operators should offer this transmission capacity at cost-based rates and on terms and conditions that are reasonable and non-discriminatory.

- Requesting providers should have the right to use this transmission capacity and related equipment for the provision of any telecommunications or information service.

- The rules should prohibit anti-competitive bundling by ensuring that incumbent cable operators cannot force their subscribers to buy services from them (or their chosen providers) before subscribers can have access to their chosen service providers.

CompTel plans to submit specific proposed rules to implement these principles based on the industry input received in this proceeding.

In order to avoid unnecessary regulations, CompTel would apply these rules only to incumbent cable operators that are offering telecommunications or information services over their cable networks. Incumbent cable operators are those cable television systems which possess market power by virtue of a *de jure* or *de facto* exclusive franchise for cable television services, or preferential treatment they have received from Government authorities. Further, incumbent cable operators would be subject to these rules only after they begin to offer telecommunications and information services, and they would be under no obligation to upgrade

their systems to install such capabilities. Non-incumbent cable systems would not be subject to these rules because they lack market power and hence do not control bottleneck local facilities.

The benefits of adopting minimum cable open access rules for incumbent cable operators are immense. While digital subscriber line ("DSL") services are becoming much more widely available in all regions of the United States due to the Telecommunications Act of 1996 and the FCC's implementation efforts, there will still be a significant number of citizens who will not have access to DSL services in the near future. Many of those citizens have access to cable television services from an incumbent operator, and they will be at the mercy of that operator for their high-speed Internet access and other broadband services. For those citizens, minimum cable open access rules are essential if they are to have a choice of providers at competitive rates.

Even for residential and business customers who have access to DSL services, the benefits of minimum cable open access rules will be substantial. These rules will ensure that all consumers have access to more services from more providers at market-driven rates. Further, these rules will spur technological innovation and create a more dynamic marketplace for information and telecommunications services by integrating the incumbent cable networks into the national telecommunications infrastructure. Without these rules, consumers will be subject to the exercise of market power by incumbent cable operators. Such operators will have the ability and incentive to impose higher rates on consumers, while engaging in anti-competitive practices (such as bundling) that give consumers fewer service and provider options.

The Commission also should not underestimate the significant role that minimum open access rules would play in ensuring that the market-opening provisions of Section 251(c) of the Communications Act are fully implemented. Despite the best efforts of Congress and the Commission, the development of local competition has been severely limited by the intransigent

refusal of incumbent local exchange carriers ("incumbent LECs") to comply with the letter and spirit of the statute and the FCC's rules. The incumbent LECs' actions are possible only because the incumbent LECs still do not face any significant wholesale competition for last-mile facilities. Minimum open access rules would change that reality dramatically by making the incumbent cable infrastructure a more attractive alternative for competitive carriers and providers. For the first time, the incumbent LECs would be faced with losing traffic and revenues, and they would have an incentive to treat requesting carriers as customers rather than competitors. The Commission must find a way to take advantage of the natural infrastructure competition between incumbent LECs and incumbent cable operators if consumers are to see the pro-competitive benefits from the 1996 Act.

The Commission has ample statutory authority to adopt minimum open access regulations for incumbent cable operators. The Commission's ancillary Title I authority allows the Commission to adopt targeted regulations designed to achieve its pro-consumer goals without imposing unnecessary burdens on incumbent cable operators or extending to non-dominant parties for whom no regulations are necessary. Further, CompTel submits that the Commission can reach effectively the same end-result through its Title II authority. In particular, it is a reasonable interpretation of the statutory term "telecommunications carrier" for the Commission to adopt a rule that incumbent operators of cable modem platforms, as facilities-based information providers, must offer the underlying transmission component as a telecommunications service to unaffiliated service providers. The Commission could use its forbearance authority under Section 10 to eliminate any Title II requirements that it believes are not necessary to secure the goals of open access, as well as limit its rule to entities, such as incumbent cable operators, that possess market power.

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments in response to the *Notice of Inquiry* ("*Notice*") released by the Commission in the above-captioned proceeding.[1] CompTel commends the Commission for initiating this proceeding, and strongly supports the adoption of rules and policies to ensure that competitive providers of telecommunications and information services, including Internet Service Providers ("ISPs"), have reasonable and non-discriminatory access to the cable modem platforms of incumbent cable operators. In these comments, CompTel identifies several principles that should form the basis of the FCC's minimum open access rules, and CompTel plans to draft proposed rules for the Commission's benefit based on the industry input received in this proceeding.

CompTel is the principal industry association representing U.S., international and global competitive telecommunications companies and their suppliers. Its approximately 340 members include numerous competitive LECs, IXCs and ISPs (both wireline and wireless) employing all types of technologies and entry strategies. It is critical for CompTel's members to have non-discriminatory access to the cable modem platforms of incumbent operators that serve

[1] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GN Docket No. 00-185, FCC 00-355 (rel. September 28, 2000) ("*Notice*").

their customers in order to compete most aggressively against both incumbent LECs and incumbent cable system operators. Therefore, CompTel strongly supports additional rules and policies to ensure that the pro-competition mandate of the Telecommunications Act of 1996 ("1996 Act") is fully achieved.

The rules proposed by CompTel in this proceeding reflect CompTel's strong belief that the Commission should seek to develop its critical broadband policies on an integrated rather than a piecemeal basis. Earlier this year, CompTel promulgated its own Broadband Policy in an effort to assist the ongoing efforts of federal and state regulators to promote the deployment of advanced telecommunications and information services. CompTel's Broadband Policy has three main tenets: first, that all local access bottlenecks should be eliminated; second, that the Internet should be kept free from unnecessary regulation and open to all users; and third, that meaningful industry self-regulation should be relied upon as the preferred approach to address privacy concerns and similar consumer issues.[2] The first two tenets strongly support minimum open access rules, which are necessary to mitigate the market power of incumbent cable operators over cable modem services while ensuring that all Americans have free and open access to the Internet through the service providers of their choice at competitive rates.

The Commission has taken numerous actions over the past four years to ensure that requesting carriers have "open access" to the bottleneck local loops of the incumbent LECs. Minimum open access rules for the cable modem platforms of incumbent cable operators are a natural and indeed inevitable extension of those efforts to promote a fully competitive market in telecommunications and information services. Were the Commission to opt for regulatory inaction, it would be setting aside perhaps the only available regulatory tool that has not been

[2] H. Russell Frisby, Jr., The Future of Regulation, Address Before the National Association of Regulatory Utility Commissioners (Nov. 11, 2000) (summarizing CompTel's Broadband Policy).

used to ensure that residential and business consumers in America see significant benefits from local competition under the Telecommunications Act of 1996. As such, regulatory inaction would violate the maxim of "do no harm" that the Commission always strives to follow.[3]

The Commission already has taken several steps to promote competition for the provision of digital subscriber line ("DSL") services across the United States by requiring incumbent LECs to open their local exchange networks to competitors.[4] However, the Commission has not yet addressed whether incumbent cable operators are, or should be, subject to similar requirements. Consequently, incumbent cable operators currently have market power over cable modem services (which are different in some respects from DSL services) as soon as they initiate those services in the marketplace. Although CompTel is pleased with the large and growing coverage area of DSL services, the reality is that cable modem platforms reach many customers that DSL providers do not. As a result, many American citizens and businesses are captive broadband customers of incumbent cable operators in areas where they do not yet have access to DSL services.

The fundamental issue in this proceeding is whether the Commission should require incumbent cable operators that provide information and/or telecommunications services to open their networks to unaffiliated providers for the provision of information and telecommunications services. CompTel submits that maximizing direct competition between the

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3 William E. Kennard, Chairman of the FCC, The Road Not Taken: Building a Broadband Future for America, Address Before the National Cable Television Association (June 15, 1999) (as prepared for delivery) ("In a market developing at these speeds, the FCC must follow a piece of advice as old as Western Civilization itself: first, do no harm. Call it a high-tech Hippocratic Oath.").

4 *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761 (1999) (adopting measures to ensure that competitive providers of advanced services can collocate in incumbent LEC central offices).

two wireline broadband local network platforms – DSL services over local loops, and incumbent cable modem platforms for cable subscribers on a shared, multiple-user basis – will result in lower prices, more service options, more service providers, enhanced technological innovation, and faster deployment of broadband services to unserved or underserved areas.

Full competition between the infrastructures of the incumbent LECs and the incumbent cable operators also will greatly facilitate the implementation of Section 251(c) of the 1996 Act. As the Commission knows, Congress adopted those provisions to promote competition, but local entry has not developed nearly as fast as Congress expected. The principal cause has been the intransigent refusal of the incumbent LECs to comply fully with Congress' requirements and the FCC's rules. By creating a real wholesale alternative for new entrants in the form of incumbent operators' coaxial cable networks, open access rules would impose the first market-based pressures on the incumbent LECs to perform as Congress desired. When the incumbent LECs perceive that they may lose customers and traffic if they do not treat new entrants as customers rather than competitors, they will finally have an incentive to implement, rather than to defeat, the critical market-opening provisions in Section 251(c).

The Commission has ample statutory authority to adopt minimum open access regulations for incumbent cable operators. The Commission's ancillary Title I authority allows the Commission to adopt targeted regulations designed to achieve its pro-consumer goals without imposing unnecessary burdens on incumbent cable operators or extending to non-dominant parties for whom no regulations are necessary. Further, CompTel submits that the Commission can reach effectively the same end-result through its Title II authority. In particular, it is a reasonable interpretation of the statutory term "telecommunications carrier" for the Commission to adopt a rule that incumbent operators of cable modem platforms, as facilities-based information services providers, must offer the underlying transmission component as a

telecommunications service to unaffiliated providers of telecommunications and information services. The Commission could use its forbearance authority under Section 10 to eliminate any Title II requirements that it believes are not necessary to secure the goals of open access, as well as to limit its rules only to incumbent cable operators.

I. OPEN ACCESS MEANS REASONABLE AND NON-DISCRIMINATORY ACCESS TO THE CABLE MODEM PLATFORMS OF INCUMBENT CABLE SYSTEMS THAT PROVIDE INFORMATION OR TELECOMMUNICATIONS SERVICES

A. The FCC Should Initiate a Proceeding To Adopt Rules To Implement Cable Open Access for Incumbent Cable Operators.

The Commission should promptly initiate a proceeding to adopt rules ensuring that providers of telecommunications and/or information services can obtain open access to the cable modem platforms of incumbent cable operators according to reasonable and non-discriminatory rates, terms and conditions. These rules are necessary to integrate the significant and growing cable infrastructure into our national telecommunications infrastructure to maximize competition and promote consumer choice. Adopting the rules CompTel proposes here will be a meaningful first step towards this integration, because they will address the most significant barriers that exist today to the competitive provision of telecommunications and information services over the cable modem platforms of incumbent operators. The result will be a tangible improvement in the ability of competitive service providers to offer a full range of basic and advanced services to all types of subscribers throughout the United States at competitive rates.

In order to accomplish these goals, the rules should implement several fundamental principles:

- The rules should require incumbent operators of cable modem platforms to provide requesting provider with unbundled transmission capacity of sufficient bandwidth (including conditioning) for the provision of the telecommunications and information services they seek to offer.

- The incumbent cable operators should offer this transmission capacity at cost-based rates and on terms and conditions that are reasonable and non-discriminatory.[5]

- Requesting providers should have the right to use this transmission capacity and related equipment for the provision of any telecommunications or information service.

- The rules should prohibit anti-competitive bundling by ensuring that incumbent cable operators cannot force their subscribers to buy services from them (or their chosen providers) before they can have access to their chosen providers.

CompTel plans to submit specific rules that incorporate these principles based on the comments and reply comments that parties file in response to the *Notice of Inquiry*.

B. The Proposed Open Access Requirements Should Apply to Incumbent Cable Systems and Their Affiliates that Provide Telecommunications and/or Information Services.

The open access requirements that CompTel proposes should be mandatory for incumbent operators of cable modem platforms that offer telecommunications and/or information services to their subscribers. The term "incumbent cable system" should be defined as any cable television system that enjoys or has enjoyed a *de jure* or *de facto* exclusive franchise for cable services. Similarly, that term should include any cable television system that has enjoyed preferential treatment from any governmental authority, including, for example, through

[5] Incumbent operators of cable modem platforms should be able to recover any costs they have reasonably incurred to upgrade their networks for the provision of telecommunications and information services.

exclusive or preferential access to rights-of-way, pole attachments, or conduits. Cable systems that do not offer telecommunications or information services would not be subject to these rules, nor would they be under an obligation to upgrade their facilities. Similarly, the proposed rules would not be mandatory for non-incumbent cable systems (*e.g.*, cable "overbuild" systems).

The distinction between incumbent and non-incumbent cable systems is consistent with the historic recognition by Congress and the Commission of the different policy consequences posed by incumbent service providers compared to competitive new entrants. One example of this recognition can be found in Section 251(c) of the Act, which imposes a series of market-opening requirements solely on incumbent LECs. Specifically, Section 251(c) requires incumbent LECs to provide requesting carriers with, among other things, interconnection, unbundled network elements, local exchange resale, and collocation.[6] Congress imposed these requirements on incumbent LECs alone, rather than upon all LECs, because only incumbent LECs derive significant market power from their bottleneck local exchange facilities, which they possess by virtue of their prior status as the monopoly local exchange carrier in particular regions. Congress realized that competition would best be achieved by requiring incumbent LECs to provide access to their local exchange networks on reasonable and non-discriminatory terms to unaffiliated providers of competing services. Accordingly, Congress imposed various pro-competitive requirements upon incumbent LECs that do not apply to competitive LECs, which lack market power.[7]

The same distinction is appropriate for incumbent and competitive cable systems. Like incumbent LECs, many incumbent cable systems have ubiquitous local networks within particular regions based upon years of operation as *de jure* or *de facto* exclusive franchisees for

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6 47 U.S.C. § 251(c).

7 *See e.g.*, *id.*; *Local Competition Order*, 11 FCC Rcd 15499 (1996); 47 C.F.R. § 51.301 *et. seq.*

cable television services. Like the incumbent LECs, many of these systems received preferential access to essential inputs (*e.g.,* rights-of-way), while being guaranteed a monopoly revenue stream from a large and entrenched customer base. These incumbent cable providers gained market power by virtue of their ubiquitous broadband cable networks that they constructed using monopoly revenues. Through years of operating those networks, these cable systems developed significant brand name recognition and a direct commercial relationship with tens of millions of customers. In many areas and for millions of subscribers, these cable systems are one of only two telecommunications wires into subscribers' premises.

The Commission frequently has recognized the market power that incumbent cable systems possess.[8] By upgrading their networks to provide telecommunications and information services, these incumbent operators can extend their market power into telecommunications facilities and services. Given the accelerating growth and market significance of advanced telecommunications and information services, the fact that these incumbent cable systems are, in some areas, the only providers with broadband local loop services augments their already significant market power as cable television operators. Incumbent cable systems are positioned to exploit their market power over telecommunications and information services by chilling new entry, limiting subscribers' service options, and extracting monopoly rents from a customer base lacking meaningful alternatives.

In contrast, non-incumbent cable systems, like competitive LECs, lack market power over telecommunications services. These new competitors do not have the advantage of a

[8] *See, e.g., Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations,* 13 FCC Rcd 23254, ¶¶ 60-61 (1998); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage,* 8 FCC Rcd 3359 (1993).

captive customer base, or years of receiving a protected revenue stream, upon which they can rely to develop their cable network infrastructure. Just as the Commission has decided for competitive LECs, the Commission should not, and need not, interfere with the market entry strategies of these nascent cable competitors. Therefore, the proposed minimum open access requirements should apply only to incumbent cable systems.

C. The Open Access Rules CompTel Proposes Here Are Technically and Operationally Feasible.

The rules proposed by CompTel would not be unduly burdensome for incumbent cable operators to implement. Rather, these rules would be a logical and incremental outgrowth of the Commission's current rules and policies. In particular, by means of these rules, the Commission will regulate the underlying telecommunications facilities of incumbent cable operators in a way that is similar to its regulation of other facilities-based carriers with market power. Further, it will achieve the same objective of ensuring that all classes of subscribers throughout the United States can gain access to a wide variety of telecommunications and information services (including high speed Internet access services) at market-based rates. These rules would not circumscribe the Internet, but rather would free the Internet from the anti-competitive restrictions that incumbent operators of cable modem platforms will be able to impose upon access to it.

There can be no doubt that incumbent cable operators are technically able to comply with the cable open access rules that CompTel proposes. Incumbent operators of cable modem platforms can be open to access via multiple telecommunications or information service

providers, as demonstrated by a pilot program of GTE, AOL and CompuServe,[9] a trial by AT&T,[10] and Canada's decision to impose stringent open access requirements.[11]

There are numerous ways to implement cable open access. For example, CompTel is encouraged by access techniques involving the use of a Subscriber Management System ("SMS"). Interconnection of competing service providers with the incumbent operator of the cable modem platform can take place at the SMS,[12] which every cable modem platform providing information services must install to manage customer accounts. An SMS is functionally similar to a traditional Internet router and is currently available from several manufacturers, including RedBack and Cisco. Because an SMS device is very similar to a traditional Internet router, interconnection between competitive service providers and the incumbent operator of the cable modem platform would be similar to the millions of other interconnections taking place throughout the world at various points on the Internet. Interconnection is achieved by plugging an ISP's fiber line into one of the ports on the SMS

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9 *See, e.g., Test Shows Cable Access Easy, GTE Says*, THE DALLAS MORNING NEWS, at 8D (June 15, 1999) (describing GTE test of its cable system in Clearwater, Florida); *GTE Test To Show That Cable Can Give ISPs Access to Networks*, THE WALL STREET JOURNAL, June 14, 1999 at B8.

10 Press Release, *AT&T, AT&T Broadband to Launch Trial of Multiple Internet Providers* (June 7, 2000), *at* http://www.att.com/press/item/0,1354,2951,00.html.

11 *Regulation Under the Telecommunications Act of Cable Carriers' Access Services*, Telecom Decision CRTC 99-8 (July 6, 1999). *See also Regulation Under the Telecommunications Act of Certain Telecommunications Services Offered by "Broadcast Carriers*," Telecom Decision CRTC 98-9, Ref. No. 8697-C12-01/98 (July 9, 1998) (in which the Canadian Radio-television and Telecommunications Commission concluded that, "with respect to higher speed access services provided by . . . an incumbent cable company or an incumbent telephone company, that it is appropriate to tariff the rates and other terms on which such services are provided, once the carrier has the ability to provide such access in respect of competitive service providers.").

12 SMS devices typically have enough ports to accommodate more than 400 ISPs, which should be more than adequate to accommodate demand in any given market. If demand were to exceed the capacity of a single SMS device, the incumbent operator of the cable modem platform could simply purchase another SMS device to stack on top of the existing SMS device. Therefore, there is no theoretical limit on the number of competitive service providers that can connect to a single cable modem platform, particularly because SMS devices are not large.

device.[13] These and other established means of cable open access demonstrate that the rules CompTel proposes here are technically and operationally feasible today for incumbent cable operators.

II. CABLE OPEN ACCESS IS NECESSARY TO ENSURE THAT ALL SUBSCRIBERS THROUGHOUT THE COUNTRY HAVE ACCESS TO BASIC AND ADVANCED SERVICES AT COMPETITIVE PRICES

Only two services are broadly available today for subscribers to receive "high speed" access to the Internet and other information resources. One is DSL service, which provides a broadband service over the incumbent LECs' narrowband local loops. The other is cable modem service, which uses the cable companies' fiber and coaxial broadband networks to provide broadband services. The nation's cable systems are the "second loop" into virtually every residential and business premises in the United States. Cable systems now pass over 105 million premises in the United States, more than 75 million of which are cable television subscribers.[14] These systems provide the only last-mile alternative that is comparable today in geographic scope and telecommunications capacity to the ubiquitous networks of the incumbent LECs. Although they appear to have a promising future, alternative local loop technologies, such as fixed wireless or satellite services, are currently available to only a limited class of

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13 One of the major advantages of utilizing SMS devices is that they provide for dynamic competitive service provider selection. SMS devices use Point-to-Point Protocol to tunnel information dynamically from subscribers to the SMS, and then Layer 2 Tunneling Protocol to tunnel the information on to the appropriate ISP. SMS devices allow time-of-day and day-of-week routing. SMS devices rely on dialer-like applications, which can be downloaded through the system to prospective cable modem service subscribers. The competitive service providers manage their own addresses and authentication procedures, but the incumbent operator of the cable modem platform manages bandwidth allocations and quality of service.

14 *Overview of Cable Modem Technology and Services*, Cable Datacom News, 1 (Kinetic Strategies, Inc.) *at* http://www.cabledatacomnews.com/cmic/cmic1.html (last visited November 21, 20000). According to an online source, "As of September 30 the total number of installed North American cable modem subscribers topped 3.8 million with 62 million homes marketed, equal to an average 6-percent penetration rate in the U.S. and Canada." *Cable Modem Market Stats & Projections*, Cable Datacom News *at* http://www.cabledatacomnews.com/cmic/cmic16.html (last visited November 21, 2000).

customers in certain areas, and will not be comparable (in terms of cost and/or coverage) to the services of incumbent LECs and incumbent cable systems for years to come. For tens of millions of U.S. citizens and businesses, the incumbent LECs and incumbent cable systems will provide the only two loops into their premises for the foreseeable future.

The Commission must adopt minimum open access rules now to ensure that the last-mile broadband facilities of cable modem platforms are viable wholesale alternatives to the incumbent LECs' local loops so that all Americans can benefit from multiple providers of basic and advanced telecommunications and information services at market-based rates. CompTel respectfully submits that it is crucial for the FCC to ensure that both markets are fully competitive rather than relying solely upon competitive pressure from one market to constrain anti-competitive behavior in the other. These rules are particularly important because the DSL market is not fully competitive today. In areas where both DSL and cable modem services are currently available, a fully competitive cable modem services market would place competitive pressure on incumbent LECs to comply with the FCC's rules and eventually result in a fully competitive DSL services market.

Equally important, minimum open access rules would protect consumers, information service providers and content providers in areas where consumers do not have any broadband alternatives to cable modem services because DSL and other broadband services are not available. Although both DSL and cable modem services provide "high speed" access to the Internet and other information resources, the technical aspects of the two services result in different availability or coverage characteristics of the different technologies. For example, although DSL services are provided over telephone lines, many households and businesses in the United States cannot obtain DSL service. In order to receive DSL service, a consumer must be

located within approximately 15,000 feet of the telephone central office as the copper is laid.[15] Thus, even if a consumer is located less than 15,000 feet from the central office, the consumer will not be able to obtain DSL service if the connection to the central office requires 15,000 feet or more of copper. In those areas not within 15,000 copper feet of a central office, cable modem service providers are the *exclusive* providers of broadband service to end-users.[16]

Even some consumers who are located within approximately 15,000 feet as the copper is laid will not be able to receive DSL. For example, DSL cannot be provided where the network contains fiber, which is incompatible with the copper used to provide DSL service.[17] Similarly, the lack of DSL trained technicians and the expense and difficulty of installing DSLAMs in central offices prevent some consumers who are located approximately 15,000 feet as the copper is laid from receiving DSL.[18] By contrast, a cable system typically must offer service to every house or business within the jurisdiction it has a franchise to serve.[19] For example, in Montgomery County, Maryland, a suburb of Washington, D.C., Comcast claims that it will "be able to offer [broadband] Internet access to all of Montgomery County when it

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15 Rob Pegoraro, *Cable Connection Selections*, Wash. Post, November 17, 2000, at E01, *available at* http://washingtonpost.com/ac2/wp-dyn/A37115-2000Nov16; Neil Randall, *Net Gains Via Broadband – Broadband options are reaching new levels of affordability – and availability; Internet/Web/Online Service Information*, Computer Shopper, November 1, 2000.

16 Rob Pegoraro, *Cable Connection Selections*, Wash. Post, November 17, 2000, at E01.; *see* Mike Musgrove, *Broadband Takes Off, More or Less*, Wash. Post, October 27, 2000, at E13 ("To get DSL . . . customers need to live within a few miles of a telephone switching office. That's not measured as the crow flies, but as the phone company's wires wend their way along poles and underground.")

17 "Non compatible electronics" such as load coils and bridgetaps add another problem for DSL providers; determining whether the line or loop is suitable for the provision of DSL service. *See McKinsey Broadband Study* at 8. Currently telephone companies must determine DSL suitability manually. Will Wade, *Sunil Shah – Raising DSL to the Broadband Stature*, Electronic Engineering Times, September 27, 2000.

18 *See* John Edwards, *DSL on the Heels of Cable*, Upside Today *at* http://www.upside.com/texis/mvm/print-it?id=39dbce200&t=/texis/mvm/ebiz/story (October 10, 2000).

19 Rob Pegoraro, *Cable Connection Selections*, Wash. Post, November 17, 2000, at E01.

finishes its system upgrade."[20] Therefore, despite overlapping coverage areas for cable modem and DSL services, cable modem services will be available to many consumers who cannot receive DSL services.

Wireless broadband technologies services will not be widely available in terms of cost or coverage for the foreseeable future.[21] Even then, the technical characteristics of these technologies will limit their overlap with cable modem platforms.[22] Some of these technologies are susceptible to obstructions that block the signals and disrupt the service or make it unavailable to certain consumers.[23] Moreover, the antennas for many of these technologies must be precisely aimed and mounted or the service will not function correctly.[24]

Of the wireless broadband technologies, satellite and some types of fixed wireless are probably the closest to being ready to compete with wired broadband access technologies. However, the only satellite services that are available at this time are one-way, downstream services.[25] As such, consumers must also use an analog modem for upstream communication.[26]

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20 *Id.*

21 *McKinsey Broadband Study* at 11, 30, 54. "A variety of wireless communications networks are *expected* to provide Internet transport, although most of these technologies are just beginning to be deployed." *GAO Report* at 46 (emphasis added).

22 *McKinsey Broadband Study* at 11.

23 For example, wireless broadband signals may be blocked by obstructions like hills, foliage, buildings, or any other obstructions that block the line of sight. Some of these frequencies are even susceptible to heavy rains. Elizabeth Douglass, *The Wireless Revolution/ AMERICAN BROADBAND / High Speeds Are Just a Blink Away,* L.A. Times, October 18, 2000; *GAO Report* at 46.

24 Elizabeth Douglass, *The Wireless Revolution/ AMERICAN BROADBAND / High Speeds Are Just a Blink Away*, L.A. Times, October 18, 2000.

25 Industry Analysis Division, Federal Communications Commission, *High Speed Services for Internet Access: Subscribership as of June 30, 2000 at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1000.pdf, Table 1 and 2 ("*High Speed Access Report*").

26 Neil Randall, *Net Gains Via Broadband – Broadband options are reaching new levels of affordability – and availability; Internet/Web/Online Service Information*, Computer Shopper, November 1, 2000. Uplinks are supposed to become available in the future but they are currently not available. *Id.*; *see McKinsey Broadband Study* at 54; *GAO Report* at 28.

Two-way satellite Internet systems are "just getting off the ground,"[27] and will not be widely available on an affordable basis in the foreseeable future.[28] Fixed wireless services may be even further away from realization than two-way satellite services. [29] Other wireless technologies, including 3G and UWB, also are far from being ready to provide competition necessary to constrain cable modem service providers.[30] Even when available, wireless broadband technologies will probably be used as a supplement to DSL or cable modem services, particularly in areas where DSL and cable modem services are unavailable,[31] rather than a

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27 Neil Randall, *Net Gains Via Broadband – Broadband options are reaching new levels of affordability – and availability; Internet/Web/Online Service Information*, Computer Shopper, November 1, 2000; *GAO Report* at 46.

28 *McKinsey Broadband Study* at 54.

29 Neil Randall, *Net Gains Via Broadband – Broadband options are reaching new levels of affordability – and availability; Internet/Web/Online Service Information*, Computer Shopper, November 1, 2000; *GAO Report* at 28 ("[N]ew wireless transport services are expected to begin operation soon.") In Phoenix, Arizona, Sprint is offering/testing a fixed wireless service that offers download speeds between 512 Kbps to 1.5 Mbps. Elizabeth Douglass, *The Wireless Revolution/ AMERICAN BROADBAND / High Speeds Are Just a Blink Away*, L.A. Times, October 18, 2000. AT&T's cellular-like system, can achieve download speeds of 512 Kbps that will be upgraded to 1 Mbps, but an upload speed of only 128 Kbps. *Id.*; *see McKinsey Broadband Study* at 53-54. It too, however, is still in the testing phase.

30 The Commission is currently considering spectrum that could be used for 3G applications. At this time, however, no spectrum is allocated for 3G purposes. Therefore, 3G is not currently a substitute for cable modem service, and it will not become one for the foreseeable future. Similarly, UWB technologies face several regulatory hurdles before they can become a competitor in the broadband sweepstakes. *See Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems*, ET Docket No. 98-153, Notice of Proposed Rulemaking, ¶ 21 (rel. May 11, 2000)("*UWB Notice*"). Many current users of the spectrum, especially users of global positioning satellite, express concern that UWB devices will create harmful interference to these vital systems. *See, e.g.*, Comments of U.S. Department of Transportation at 4, 10-15, U.S. GPS Industry Council at 11-12 in ET Docket No. 98-153. Furthermore, UWB proponents are attempting to qualify UWB as Part 15 devices, which are not entitled to interference protection from licenses and must accept interference from both primary and secondary licensees of the spectrum. 47 C.F.R. § 15.5. For all of these reasons, the Commission cannot consider UWB services as a potential competitor to cable modem services.

31 *McKinsey Broadband Study* at 11, 30, 54. Similarly, the transmission of broadband services through electric or power lines is still on the drawing board in the United States. Although trials are currently underway in Europe, this technology may never make it to the United States due to technological differences in the electric networks. Even where available, broadband services provided over electric lines is thought of as a possible residential application, and there are significant concerns about capacity, range, signal to

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substitutable replacement. Therefore, the Commission should not rely on any broadband technologies to prevent incumbent operators of cable modem platforms from exercising their market power in a discriminatory and anti-competitive manner.

III. OPEN ACCESS WILL ENSURE THAT CONSUMERS HAVE ACCESS TO A DIVERSE ARRAY OF TELECOMMUNICATIONS AND INFORMATION SERVICES AT COMPETITIVE RATES FROM THE PROVIDER OF THEIR CHOICE

The open access rules proposed by CompTel will promote the overriding public need for competitive access to the broadband transmission facilities of incumbent cable systems. Consumers will directly benefit from the wholesale market in broadband capacity that will result from minimum cable open access requirements on incumbent cable operators. Although CompTel strongly believes that these rules will promote consumer interests for both telecommunications and information services, the most immediate consumer benefits from the proposed rules would be to ensure competitive access by consumers to the information services providers of their choice at competitive rates.

A. Open Access Rules Will Ensure That Consumers Have Access to a Greater Variety of Information Service Offerings at Lower Prices From the Information Service Provider of Their Choice.

The open access rules that CompTel proposes here will provide consumers with more freedom in selecting an information service provider, because incumbent operators of cable modem platforms will not be able to force consumers to purchase the services of affiliated information service providers and competitors will have access to cable broadband capacity at cost-based rates. As such, the proposed rules will encourage market entry by new information

(…continued)
noise ratio, distribution and interference problems. Therefore, at this point of its development, broadband services provided over electric lines are not a viable competitor to DSL or cable modem services.

service providers. Multiple information service providers will compete more vigorously than ISPs that are guaranteed market share by exclusive or preferred arrangements with incumbent operators of cable modem platforms. The benefits of this competition will flow not only to consumers of cable modem services, but also to consumers of all types of high speed Internet access.

Without these rules, incumbent operators of cable modem platforms will be able to require subscribers to purchase a bundled or tied "package" of services – in effect, forcing the subscriber to purchase unwanted information or cable services in order to obtain access to the desired broadband transmission services.[32] In this way, the incumbent operators of cable modem platforms will be able to prevent subscribers from using the service providers they prefer. An incumbent operator can achieve that result by either refusing to let unaffiliated information service providers use its cable facilities to reach customers, or signing an exclusive arrangement with one provider (or preferred arrangements with a few providers) for such access.

Unable to shop among competing information service providers, subscribers will be faced with taking the entire package or not receiving the service at all. Subscribers who wish to use other information service providers will be denied their choice, or they will be made to pay a monetary penalty because they will have to pay for the services of the affiliated ISP as well as for those of the ISP of their choice. Either way, subscribers will suffer from the absence of competing providers through open access requirements.

The incentives of incumbent operators of cable modem platforms to leverage their market power in cable modem services into a competitive market – information services – or

[32] Tying occurs where a consumer purchases one product (the "tied" product), not on its own merits, but to secure the other product (the "tying" product) either at all, or on more favorable terms. Phillip Areeda, Antitrust Law, Vol. IX, ¶ 1700a. (1991).

limit entry into the monopoly market – cable modem services – are well established.[33] For example, the bundling or tying of cable modem and information services would allow incumbent operators of cable modem platforms to earn supra-competitive prices on both the cable modem service and of the complementary information service, even if inferior. For example, the incumbent operator of a cable modem platform might offer a lower, but yet still supra-competitive, price for cable modem services to those subscribers who also purchase its cable or Internet services. Accordingly, the minimum open access rules that CompTel proposes here are critical to ensure that consumers have access to a greater variety of information service offerings at lower prices from the information service provider of their choice.

B. Open Access Rules Will Ensure That Consumers Benefit from Lower Prices for Broadband Transmission Services as a Result of Competition.

Consumers of both DSL and cable modem services will benefit from lower prices resulting from competition, or at least the threat of competition, provided by two fully open broadband local network platforms. These results are consistent with, and even required by, Sections 1 and 706 of the Telecommunications Act. By contrast, allowing incumbent operators of cable modem platforms to retain exclusive control of the nation's broadband "second loops" will impede the growth of both the broadband telecommunications and information services industries. Entry by service providers will be more difficult, and the development of technologies and service offerings will be impeded.

A market characterized by a few service providers charging inflated prices is inherently less dynamic and innovative than a market characterized by many service providers

[33] For a theoretical discussion of the economic incentives, and anti-competitive benefits, to tying, see Dennis Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, National Bureau of Economic Research: Cambridge MA, December 1998.

charging competitive rates. Many incumbent operators of cable modem platforms will charge excessive rates for their telecommunications and information service packages. In a monopoly market (where cable modem service is the only realistic broadband service available today) or a duopoly market (where cable modem and DSL services are the only realistic broadband services available today), the profit-maximizing price for an incumbent operator of a cable modem platform is significantly higher than in a competitive market environment. Moreover, a fully competitive cable modem services market would place pressure on incumbent LECs that provide DSL services, and thus would lead to a more competitive DSL services market.

The minimum open access rules that CompTel proposes are particularly important in those areas where the incumbent LEC and the incumbent cable system are owned by the same entity.[34] In those areas (many of which are rural), the same entity will have consolidated market power in both the narrowband and broadband services market. Thus, the incumbent's market power is much stronger, which significantly increases the risk of anti-competitive behavior. Therefore, it is crucial that the Commission ensure that competitive service providers have access to the broadband facilities of the incumbent cable system so that consumers will have many choices among competing service providers at competitive rates.

C. Open Access Rules Will Ensure That Consumers Benefit from Competition in the Market for Internet Content.

If incumbent operators of cable modem platforms are able to bundle information services with their cable modem services, they will be able to exercise their market power in a way that adversely influences the market for Internet content. For example, several incumbent providers of cable modem services have entered into exclusive arrangements with affiliated ISPs,

[34] *See, e.g.,* Ameritech New Media Enterprises, Inc. To Construct, Operate, Own and Maintain Facilities Necessary to Provide Cable Television Service For Glendale Heights, Illinois, 11 FCC Rcd 14311 (1996).

through which their subscribers must pass in order to reach the Internet. With complete power over the portal through which their subscribers reach the Internet, incumbent operators of cable modem platforms and their affiliated ISPs will be able to discriminate unfairly against unaffiliated providers of content on the Internet.

Incumbent operators of cable modem platforms and their affiliated ISPs can use "routing" and caching" technology to enable faster and updated access to preferred Web Sites, and slower and less frequently updated access to other Web Sites.[35] This type of unfair discrimination raises very disturbing implications for the Internet and content providers, and also for consumers. The danger from this type of unfair discrimination is very real, and particularly disturbing because it could change the behavior of consumers. The end result could be the inhibition of competition in the Internet content market, as well as the in the markets of any business that competes for traffic on the Internet

Incumbent operators of cable modem platforms and their affiliated ISPs would also have market power in the content market if they were not subject to minimum open access because they would have the sole control over access to their subscribers. As such, incumbent operators of cable modem platforms could guarantee that their subscribers have to pass through their affiliated ISP, and content providers could be forced to strike unfair deals in order to ensure that subscribers of cable modem services have access to their content.

Imposition of open access rules on incumbent operators of cable modem platforms would reduce the likelihood of unfair discrimination through the use of preferential "routing" and "caching." If subscribers of cable modem services have access to competitive service providers, they are less likely to remain with an ISP that unfairly discriminates against

[35] *See, e.g.*, Letter from Senators DeWine and Kohl to Robert Pitosfsky, Chairman of the Federal Trade Commission Chairman, and William Kennard, Chairman of the Federal Communications Commission (May 10, 2000).

unaffiliated content providers. Perhaps more importantly, unfair discrimination will be more easily detectable because multiple service providers with different affiliations will be able to serve the same subscriber base. Even if subscribers are still unable to detect the unfair discrimination, competition from multiple service providers will lessen the discriminatory effect of unfair discrimination because each service provider will have different affiliations. For similar reasons, imposing unbundling requirements on incumbent operators of cable modem platforms will reduce their monopsonistic power. Quite simply, multiple service providers will have access to the same subscriber base, and content providers will have multiple customers to which they may compete to serve.

D. The Risk that Consumers Will Be Harmed Unless the Commission Adopts Open Access Rules Now is High.

Maintaining a wait-and-see attitude to the regulation of incumbent cable modem platforms will cause irreparable harm to millions of American citizens and businesses. The adverse effects of unchecked anti-competitive actions by incumbent operators are magnified with each day that the FCC delays in adopting minimum cable open access rules. Incumbent operators of cable modem platforms will be able to "lock in" customers through long-term service contracts that are paid in advance, and through the natural reluctance of customers (especially businesses) to move to a new provider in the future if it means changing their e-mail

names, or due to the high cost[36] and inconvenience[37] associated with switching to a new type of technology. Therefore, any delays in adopting minimum open access rules will allow incumbent operators of cable modem platforms more time and opportunity to extract monopoly rents and to entrench their customer base against future competitive entry.[38]

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36 DSL installation fees range from $100 to $600. Cable modem installation costs from $00 to $200 plus the cost of the modem, which usually costs approximately $200. *Online Connections: Growing Broadband Interest Marks Dial-Up's Final Days*, Smart Computing, *at* http://www.smartcomputing.com/email.asp?emid=11565 (last visited November 27, 2000). The estimated installation costs for satellite range from $300 to $800. *Internet Access Services Comparison*, ZDNet, *at* http://www.zdnet.com/products/stories/reviews/0,4161,2475136,00.html (last visited November 22, 2000). Installation fees for fixed wireless systems run up to $299 plus equipment that ranges from $99 to $299. Elizabeth Douglass, *The Wireless Revolution/ AMERICAN BROADBAND / High Speeds Are Just a Blink Away*, L.A. Times, October 18, 2000.

37 *See e.g.*, John Edwards, *DSL on the heels of cable*, Upside Today, Nov. 2000 *at* http://www.upside.com/texis/mvm/print-it?id=39dbce200&t=/texis/mvm/ebiz/story (Oct. 10, 2000) (DSL's roll out has been slowed by a lack of equipment. Plus, equipment is expensive and hard to install. Also, DSL providers are faced with the time-consuming task of straightening out coils of copper.).

38 The well recognized advantages that the first entrant to a market enjoys are far greater for the Internet and other advanced telecommunications and information services. In the words of George Bell, President of Excite@Home:

> "*I think the critical years are the early years.* Look at the advantages Yahoo! Has today, not only because they started 18 months before anybody else. And so you might not think that it's an important month now or important quarter now when you think about the total number of subscribers in broadband . . . *but it absolutely becomes the foundation of people's brand recognition and loyalty*."

Customers are far more reluctant to change their ISP than their long distance carrier, because Internet addresses and domain names are not fully portable, and consumers develop relationships with other on-line users through chat groups and other forms of access that will not be offered by other ISPs. Broadband service providers are well aware of this fact, and it is well recognized in the Information age that "[w]hoever gets to the household first will win." Rob Lemos, *Who Will Rule the Broadband Era?*, ZDNN, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2282620,00.html (last visited November 27, 2000)(quoting an analyst with Dataquest, a market research firm).

IV. A COMPETITIVE WHOLESALE MARKET FOR BROADBAND SERVICE WILL NOT DEVELOP UNLESS THE FCC ADOPTS OPEN ACCESS REQUIREMENTS FOR THE CABLE MODEM PLATFORMS OF INCUMBENT CABLE SYSTEMS.

A. The Value of a Competitive Wholesale Broadband Market

The incumbent LECs' local exchange networks are "one of the last monopoly bottleneck strongholds in telecommunications,"[39] and thus should remain a central focus of our nation's telecommunications policy. Since the passage of the 1996 Act, the Commission and Congress have focused their efforts on making the local loops of incumbent LECs available for the provision of competing services by multiple carriers at cost-based rates. Congress inserted provisions in the 1996 Act that subjected the incumbent LECs to a variety of specific obligations regarding interconnection, unbundling, collocation and local exchange resale.[40] Further, the Commission has undertaken numerous proceedings and, as Congress directed, adopted a regulatory regime to implement those requirements.[41] State regulators also have played a critical role in arbitrating and approving interconnection agreements, and establishing rules to foster competition as envisioned in the 1996 Act. The ultimate goal of Congress, the Commission, and State regulators has been to eliminate legal, economic and operational barriers to entry by competitors in local telecommunications markets.

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39 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 15506 (1996).

40 47 U.S.C. §§ 251(c)(2)-(4), (6).

41 *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 9564 (1996), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996); *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 12 FCC Rcd 18730 (1997).

Despite the best efforts of legislators and regulators, the incumbent LECs have often complied grudgingly, or refused to comply at all, with applicable statutory and regulatory requirements, with the result that their local exchange networks (including local loops) are not fully available on a wholesale basis for market entry as contemplated by Congress. In particular, incumbent LECs have failed to comply fully with the requirement that they provide unbundled network elements ("UNEs") alone and in combinations for the provision of telecommunications services. More than four years after the 1996 Act was adopted, the incumbent LECs still have not developed reliable and efficient operations support systems, which comprise a critical capability for competing carriers to enter the local market. Further, the incumbent LECs have (so far successfully) generally blocked the use of UNE combinations by new entrants. The so-called UNE Platform is available today in only a few states, and incumbent LECs have thrown one roadblock after another in the paths of requesting carriers seeking to use enhanced extended loops ("EELs") to provide services to customers. In many states, the incumbents LECs have established excessive UNE rates that inhibit new entry. As one example, Verizon's decision to transfer its UNE rates in New York to Massachusetts in an effort to shore up its pending Section 271 application for Massachusetts illustrates that the industry has been forced to endure excessive UNE rates in Massachusetts for several years.[42] Unfortunately, excessive rates still prevail in other states where the exigency of a Section 271 application has not led the incumbent LEC in the state to offer reasonable rates.

Further, the ability of requesting carriers to support their entry strategies via collocation arrangements has been severely limited. As the Commission has recognized, it has been forced to adopt a series of ever more detailed collocation rules due to the incumbent LECs'

[42] Letter dated October 13, 2000 from G. Evans, Verizon, to M. Salas, Secretary of the FCC in Application by Verizon New England, Inc., CC Docket No. 00-176.

obstinate actions designed to make collocation more costly, less timely, and less efficacious for requesting carriers.[43] Unfortunately, a court decision has compounded the incumbent LECs' efforts by raising questions about the collocation practices that requesting carriers are entitled to implement under the statute.[44] Moreover, the decision of many incumbent LECs to install thousands of remote terminals throughout their regions (*e.g.*, SBC's Project Pronto) has created novel policy issues for the Commission and the industry. Although the FCC has begun to address those issues,[45] many of the fundamental technical and operational issues necessary for remote terminal collocation have yet to be worked out by the industry or the Commission. As a result, the potential for collocation to serve as an engine for new local entry has not come close to being realized.

The Commission's own data confirm that local competition remains at best nascent in the United States, as new entrants have made little headway in gaining local market share from the incumbent LECs.[46] These numbers confirm that the incumbent LECs' intransigent refusal to implement the market-opening provisions of the 1996 Act has prevented competitive carriers from receiving the wholesale access to last-mile connectivity that they need to provide a full array of telecommunications and information services, including advanced services, to all types of consumers throughout the United States. While CompTel supports and

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43 Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 00-297, ¶¶ 2, 21-22, 28 (Aug. 10, 2000) ("Order on Reconsideration"); Deployment of Wireline Services Offering Advanced Telecommunications Capability, DA 00-2538 (Nov. 7, 2000) ("Memorandum Opinion and Order"); GTE Service Corporation, File No. EB-00-IH-0113 (Aug. 1, 2000) ("Consent Decree").

44 *GTE Service Corp. v. FCC*, 205 F.3d 416, 422, 426 (2000).

45 Ameritech Corp. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Acts and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, FCC 00-336 (Sept. 8, 2000).

46 *See, e.g.*, Industry Analysis Division, FCC, *Trends in Telephone Service*, 9-1 (May 2000) (noting that incumbent LECs claimed 96% of local service revenues in 1998).

applauds the Commission's ongoing efforts to implement the market-opening provisions of the 1996 Act, it is imperative that the Commission use all available tools to produce the market results and consumer benefits Congress desired. The minimum open access rules proposed by CompTel should be adopted because they will impose a modicum of market pressure on the incumbent LECs' dominance of the local wholesale market, thereby creating incentives for the incumbent LECs' to comply with the obligations under Section 251(c) and the FCC's rules implementing those requirements.

The incumbent LECs' refusal to comply with the 1996 Act and the Commission's rules would not be possible except for the relative absence of last-mile alternatives for new entrants. As long as the incumbent LECs feel no competitive wholesale pressures from cable systems, they will continue to act, as they have consistently since the passage of the 1996 Act, to frustrate rather than promote the business plans of new entrants to inject competition into the local market. Such a strategy makes sense because there is little danger that a competitor profitably will move large volumes of traffic to other networks. By adopting the minimum open access rules proposed by CompTel, the incumbent LECs, for the first time, will be faced with the possibility of losing traffic and revenues to competing cable networks, and they will have an incentive to treat new entrants as customers, rather than competitors, in order to keep their business.

The efficacy of Section 251(c) in promoting local competition would be maximized by the adoption of the minimum open access rules proposed herein. Although competitive LECs continue to build-out their networks to customers' premises when and where they can, it is economical for them to do so today only for selected portions of the more densely populated business districts in urban areas. For the tens of millions of Americans who live in less densely populated areas, or who are small-volume customers in urban areas, there will be

two and only two local loop alternatives – the incumbent LECs' loop and the cable system's loop – for the foreseeable future. The Commission must find a way to take advantage of this natural infrastructure competition if consumers are to see the pro-competitive benefits from the 1996 Act. Coupled with ongoing efforts by the Commission and State regulators to implement and enforce existing requirements, the presence of an alternative broadband facility that can siphon off traffic and customers from the incumbent LECs' networks will help ensure that the incumbent LECs improve their systems and procedures for providing UNEs efficiently and seamlessly to competing carriers. Therefore, adopting regulations to ensure that multiple carriers can move their customers and traffic away from the last-mile facilities of incumbent LECs to the last-mile facilities of incumbent cable systems will promote telecommunications competition as intended by Congress when it adopted the 1996 Act.

B. FCC Precedent for Promoting Competition Through Open Access

Adoption of the minimum open access rules that CompTel proposes would be the latest in a long line of steps that the Commission has taken to promote competition in various markets, including the markets for customer premises equipment ("CPE"), information services, and telecommunications services. The Commission consistently has promoted competition by ensuring that competitors have access to the telecommunications elements they need to compete effectively. For example, in *Carterfone*[47] and related cases, the Commission created a competitive CPE market by ensuring that competitive vendors of CPE had access to AT&T's network. Specifically, the Commission exercised its authority under Title I by requiring AT&T to permit consumers to connect devices manufactured by competitive CPE vendors to the

[47] *Use of the Carterfone Devise in Message Toll Telephone Service*, 13 FCC 2d 420 (1968), *recon. denied*, 14 FCC 2d 571 (1968).

network.[48] The Commission took this step despite AT&T's claims that competition in the CPE market would compromise the integrity of the network and "retard development of the system since the independent equipment supplier would tend to resist changes which would render his equipment obsolete."[49] In so doing, the FCC implicitly recognized that competitors can develop and implement new and innovative technologies and services that the incumbent has been unable or unwilling to provide. Time has proven that the Commission's decision to create a competitive CPE market stimulated the introduction of new services that use existing network functionalities in innovative and more efficient ways.

The Commission took a similar step in Computer II and subsequent decisions when it required facilities-based carriers with market power to offer unbundled transmission services to information service providers under tariff. In these decisions, the Commission exercised its Title I authority to ensure that competitive information service providers have access to necessary underlying telecommunications services.[50] As a result of the competition that ensued when many new providers entered the information services market, the information services industry developed innovative new service offerings, which in turn ultimately facilitated the dynamic growth of Internet services.[51] The necessary underlying telecommunications service – unbundled wholesale transmission capacity – proved to be a critical building block for the development of the entire information services industry.

Another important step in the Commission's efforts to promote competition and consumer choice was its decision to permit competing long distance carriers to originate and

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48 *Id.; see also* 47 C.F.R. §§ 68.1 - 68.506.

49 *Carterphone*, 13 FCC 2d at 424.

50 *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 388-89 and 476-77 (1980) ("*Computer II*").

51 *Id.*

terminate interstate calls over the incumbent LECs' local exchange facilities at wholesale rates and on non-discriminatory terms and conditions.[52] The Commission's decision to ensure that all long distance carriers have efficient access to the incumbent LECs' local networks played a seminal role in spurring the growth in the number of long distance carriers and the strong competition that now characterizes that industry segment. The long distance market now rests upon a vibrant wholesale marketplace based upon the development of nationwide and regional backbone networks. The Commission has recognized that wholesale transmission facilities were "a major reason for the increased competition in the long distance services market."[53] The wholesale market has allowed long distance carriers to enter the market at minimum cost, while deploying their own facilities increasingly in line with their business plans. The success of that approach is demonstrated by the FCC's decision to treat AT&T as a non-dominant carrier for domestic long distance services, which is based in part on the presence of multiple, independent, nationwide transmission networks.[54]

In short, each time the Commission has faced the issue of whether bottleneck network facilities should be made available to unaffiliated service providers, it has opted in favor of *more* options and *more* choices as the best means to promote competition and the interests of the consumers. The efficacy of using alternative cable facilities to help requesting carriers obtain better access to the incumbent LECs' local networks cannot be doubted. By adopting open

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52 *See, e.g., Investigation of Access and Divestiture Related Tariffs*, 101 FCC 2d 911 (1985) ("*Allocation Order*"); *Investigation of Access and Divestiture Related Tariffs; Allocation Plan Waivers and Policies and Rules Concerning Changing Tariffs*, 101 FCC 2d 935 ("*Waiver Order*"); *Long Distance Carriers*, 2 FCC Rcd 1038 (1992) ("*PIC Change Order*"); *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, 10 FCC Rcd 9560 (1995) ("LOA Order").

53 *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, FCC 98-225, ¶ 42 (Sept. 14, 1998).

54 *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3303-05, ¶¶ 57-63 (1996).

access requirements for incumbent cable systems, the FCC could create the same wholesale alternatives that bolstered competitive new entry into the CPE, information services, and long distance markets. The resulting competition would lead to greater consumer choice, lower costs, and new and innovative technology, just as it has in the CPE, information services, and long distance markets.

V. THE PROPOSED UNBUNDLING REQUIREMENTS WILL NOT CHILL INVESTMENT OR DEGRADE CABLE MODEM PLATFORMS.

Adopting the minimum open access rules proposed by CompTel will not stifle investment or slow the growth of the Internet. Arguments by incumbent operators of cable modem platforms to the contrary are transparent scare tactics designed to protect their monopoly revenue streams through regulatory inaction. In essence, these arguments are like telling the FCC at the dawn of the television era that if they regulate broadcast services, no one will invest in television. As we know now, FCC regulation of television broadcasting has not appreciably slowed the growth of that industry, and arguably has had the opposite effect by spurring growth through business certainty. Similarly, the FCC's unbundling requirements will not inhibit investments in cable modem platforms or slow the growth of the Internet, which is an economic, technological and social phenomenon on par with the advent of television. Incumbent operators of cable modem platforms will continue to invest in the facilities necessary to provide telecommunications and information services regardless of whether they must comply with unbundling requirements, because they cannot afford not to. The suggestion that cable monopolists would react to modest regulation of their monopolies by forsaking what may be the most significant growth industry of our generation is ridiculous. The unbundling rules that apply to incumbent LECs certainly have not stopped them from making significant investments in DSL, as investments like SBC's "Project Pronto" demonstrate.

These arguments are also contrary to the laws of economics. Incumbent operators of cable modem platforms with unfettered market power will invest less than those without market power, because they have an incentive to restrict output in order to maximize profits. If the Commission refused to adopt minimum cable open access rules, incumbent cable owners would make only those investments that are necessary to maximize their monopoly revenues. Regulatory *laissez faire* almost always results in under-investment by service providers with market power. By contrast, regulation that promotes competitive entry creates incentives for all service and content providers to increase investment and speed up the deployment of advanced telecommunications and information services. Consumer choice leads to more investment and increased innovation as competitors vie for customers. This has especially been true with the development of the Internet.[55] Thus, the Commission need not be concerned that cable open access requirements would slow incumbent cable owners from upgrading their cable systems to capture the broadband services market. Rather, the Commission should be more concerned that a "wait-and-see" attitude will actually stunt critical investment in the cable modem platforms by incumbent cable systems.

Nor is the broadband services market too young or unpredictable for open access requirements. The future of broadband is far from uncertain. Experts agree that a huge unmet demand for broadband access exists.[56] Recognizing the huge potential of the broadband market, incumbent cable owners have been upgrading their cable systems for years with the knowledge

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55 *See* Francois Bar, Stephen Cohen, Peter Cowhey, Brad DeLong, Michael Kleeman, John Zysman, *Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm*, The University of California E-conomy Project, *at* http://e-conomy.berkeley.edu/publications/wp/ewp12.html (last visited November 26, 2000).

56 *See, e.g.*, Seth Schiesel, *The Outlook for Cable Access: An AT&T-AOL Deal Would Rain on* Excite@Home's *Parade*, NEW YORK TIMES, p. C1 col.2 (Aug. 9, 1999) (quoting Excite@Home's chairman that "We're a long way from being a demand-limited system.").

that broadband access might be regulated like DSL services. Under these circumstances, minimum cable open access requirements would merely ensure that competitors develop their networks in a way that fosters competition rather than excluding competitors.

VI. THE COMMISSION HAS THE LEGAL AUTHORITY TO ADOPT MINIMUM CABLE OPEN ACCESS REQUIREMENTS FOR INCUMBENT CABLE OPERATORS

The Commission has the statutory authority to adopt rules requiring incumbent cable systems to provide open access to their cable modem platforms. The Communications Act extends to "all interstate and foreign communications by wire or radio,"[57] and Congress defined the term "wire communication" to include "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, *cable*, or other like connection between the points of origin and reception."[58] These statutory provisions remove any possible doubt that the cable modem platforms of incumbent cable operators are subject to the Act.[59]

In designing the Act, Congress sought "to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications."[60] Congress created a statutory scheme giving the Commission various bases of jurisdiction and a selection of regulatory tools for promoting the public

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57 47 U.S.C. § 152(a).

58 47 U.S.C. § 153(51) (emphasis supplied).

59 *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

60 *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846, 853 (5th Cir. 1971), *cited in Computer and Communications Indus. Ass'n. v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982). Congress hoped "to avoid the necessity of repetitive legislation." *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 199 (D.C. Cir. 1969) (footnote omitted), *cert. denied*, 397 U.S. 922 (1970).

interest.[61] The Commission has broad discretion to choose which jurisdictional base and which regulatory tools will be most effective in advancing Congress' objectives.[62]

With respect to incumbent cable systems, the Commission has at least two independent sources of statutory authority that require or enable minimum open access requirements. *First*, the Commission has the authority to adopt minimum open access requirements pursuant to its Title I ancillary jurisdiction, which gives the Commission broad flexibility to tailor its requirements so that they promote fully its statutory responsibilities. In this case, minimum open access requirements are necessary to effectuate various Title II provisions, including the requirement for just, reasonable and non-discriminatory rates and practices, as well as the market-opening provisions in Section 251(c). Title I is a supple and possibly even preferred regulatory tool because it maximizes the Commission's discretion to adopt only those rules that are necessary to maximize consumer benefits from the incumbent cable infrastructure.

Second, as the Court in *AT&T Corp. v. City of Portland* ruled, the Commission has the authority to adopt rules that incumbent cable systems offering telecommunications services and/or information services over their own facilities must operate as "telecommunications carriers" under the 1996 Act,[63] thereby subjecting them to various

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61 *See Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282, 284 (D.C.Cir. 1966) ("In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.").

62 *Id.* "The Commission's choice of regulatory tools . . . must be upheld unless arbitrary or capricious." *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982), *citing* 5 U.S.C. § 706(2)(a) (1976); *see also National Ass'n of Regulatory Util. Comm's v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976) (*quoting NBC v. United States*, 319 U.S. 190, 219 (1943) (in light of rapid technological change in the industry, Congress gave the Commission "not niggardly but expansive powers").

63 47 U.S.C. § 153(44); *see also* 47 U.S.C. §§ 153(43), (46).

obligations, including the duty to interconnect with all other requesting carriers.[64] Once incumbent cable operators are classified as "telecommunications carriers," the Commission has ample rulemaking authority to adopt minimum open access requirements for such systems to implement the interconnection duty in Section 251(a) as well as other Title II provisions. In addressing the Title II issues, the Commission should keep in mind its well-established authority to impose a legal requirement on an entity, such as an incumbent operator of a cable modem platform, to operate as a telecommunications carrier on a common carrier basis.

At the same time, the Commission should make clear that any rules it adopts to implement Title I or Title II of the Act do not extend to non-dominant cable systems. As regards Title I, the Commission has inherent discretion to adopt rules that apply only to those entities whose regulation would promote the public interest. As regards Title II, the Commission has statutory authority, including its forbearance authority under Section 10, to avoid the imposition of common carrier requirements where it would not promote the public interest.

A. Internet Access Provided Through a Cable Modem Platform Consists of Telecommunications and Information Services.

In the *Notice*, the FCC asks for comment on the variety of legal or policy frameworks that might apply to cable modem platforms.[65] In asking for comment on this issue, the FCC suggests that there may be a number of possible regulatory approaches, including regulation as a cable service subject to Title VI; as a telecommunications service under Title II; as an information service subject to Title I; or some entirely different or hybrid service subject to multiple provisions of the Act.

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64 47 U.S.C. § 251(a)(1).

65 *Notice* ¶¶ 15-24.

The 1996 Act explicitly defines "telecommunications services," "information services " and "cable services," and specifies how each of these services must be regulated. These definitions are mutually exclusive,[66] and they are not based on the type of facility used to provide the services. In fact, Congress has directed the FCC not to classify providers based on the type of facilities they use to provide services.[67] Accordingly, a "telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers."[68]

Cable modem platforms are capable of providing three different types of services as defined by the 1996 Act: cable services, telecommunications services and information services. Subscribers of cable modem services typically perceive these three distinct types of services in two separate ways: (1) traditional television channels (including, *e.g.*, local stations, HBO, MTV and the Discovery Channel), which are cable services; and (2) Internet access, which consists of telecommunications and information services. Accordingly, although "telecommunications services," "information services" and "cable services" are by definition mutually exclusive, a given cable operator may offer all three.

Traditional television channels fall squarely within the statutory definition of "cable service." The Act defines "cable service" as "(a) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (b) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming

66 *See, e.g., Application of BellSouth*, 13 FCC Rcd 20599, ¶ 314 (1998).

67 *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11530 ¶ 59 (1998)("*Report to Congress*").

68 *Report to Congress* at 11530, ¶ 59.

service."[69] For the purposes of this definition, "video programming" means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station,"[70] and "other programming service" means "information that a cable operator makes available to all subscribers generally."[71] Under this statutory definition, a traditional television channel provided via a cable system is a "cable service" because it is a one-way transmission of programming available to all subscribers generally that is comparable to programming provided by a television broadcast station. Accordingly, traditional television channels provided via cable systems are subject to Title VI of the Act, as well as the FCC's regulations adopted pursuant to Title VI.

By contrast, Internet access services provided via a cable modem platform do not fall within the statutory definition of "cable service." Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the Act. Moreover, because Internet access is a two-way service,[72] it is irrelevant whether subscribers can utilize their Internet access service as a "video programming" or "other programming service."[73] As the Court of Appeals for the Ninth Circuit has observed, "[s]urfing cable channels is one thing; surfing the Internet over a cable broadband connection is quite another."[74] Therefore, Internet access services cannot be regulated as "cable services" under the Act.[75]

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69 47 U.S.C. § 522(6).

70 47 U.S.C. § 522(20).

71 47 U.S.C. § 522(14).

72 CompTel does not address here Internet access services using technologies that combine regular phone lines and existing cable television plant.

73 *See* 47 U.S.C. § 522(6) (limiting the definition of cable services to include solely one-way services).

74 *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000).

75 *See Notice* ¶¶ 16-17.

Internet access for most users – regardless whether provided on a dial-up, DSL or cable modem basis – consists of two separate services under the Act: an information service with a telecommunications component.[76] A conventional ISP provides its subscribers with access to the Internet at its point of presence ("POP"), which is identified by a unique Internet address. The subscribers can connect to the ISP's POP through, among other means, a conventional dial line, a DSL line, or a cable modem platform. The link between the subscriber and the ISP is classic "telecommunications," which the Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[77] When telecommunications are offered "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public," the resulting service falls within the statutory definition of a "telecommunications service," "regardless of the facilities used."[78] For this reason, providers that offer dial-up and DSL links to an ISP as telecommunications services are subject to common carrier obligations.[79]

Other services provided by a typical ISP, including e-mail and WebPage hosting, are classic "information services." The Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[80] In order to provide information

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76 It is well established that "[b]ecause information services are offered 'via telecommunications,' they necessarily require a transmission component in order for users to access information." *Report to Congress* at 11529, ¶ 57.

77 47 U.S.C. § 153(43).

78 47 U.S.C. § 153(46).

79 *See, e.g., GTE Operating Companies Tariff No. 1*, 13 FCC Rcd 22466 (1998) (concluding that DSL service is an advanced telecommunications service that is subject to common carrier obligations).

80 47 U.S.C. § 153(20).

services, ISPs use telecommunications to transport data on their own networks and to other ISPs or the Internet backbone, which is consistent with the statutory definition for "information services." The "information services" provided by ISPs to their subscribers are not subject to regulation under Title II of the Act.[81]

The regulatory status of both components of Internet access under the Act is undisputed when separate entities provide the telecommunications service component and the information service components. For example, subscribers who access the Internet through dial-up or DSL connections typically receive the telecommunications component from their local exchange carrier or DSL provider, which provides the telecommunications link between the subscriber and the ISP, and the information service component from their ISP, which provides, among other things, e-mail and WebPage hosting. Any entity that provides telecommunications services to connect a subscriber to its ISP is regulated as a telecommunications carrier under Title II of the Act,[82] while the ISP itself, as a provider of solely information services, normally is not subject to regulation under Title II.[83]

The regulatory status of Internet access under the Act is also clear, although more complex, when the same entity provides both the telecommunications and information service components. Under these circumstances, the Internet access provider does more than offer pure data transport, which is a telecommunications service, to its subscribers. Rather, the Internet access provider "conjoin[s] the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service."[84] For nearly 20

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81 *See, e.g., Report to Congress*, 13 FCC Rcd at 11540, ¶ 81; *AT&T v. City of Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000) (discussing regulatory treatment of ISPs).

82 *See Report to Congress* at 11530, ¶ 59.

83 *See, e.g., AT&T v. City of Portland*, 216 F.3d 871-878 (9th Cir. 2000) (noting that information services have never been subject to regulation under the Act).

84 *Report to Congress* at 11540, ¶ 81.

years, the FCC has made it clear that offerings by non-facilities-based providers which combine telecommunications and information services should always be deemed to be "information services."[85] At the same time, the Commission has recognized that it has the authority to require facilities-based information services providers to unbundle the underlying telecommunications as a tariffed common carrier offering.[86]

For the same reasons, CompTel respectfully submits that incumbent operators of cable modem platforms that offer their subscribers bundled information and telecommunications services, such as Internet access, should be required to implement cable open access. The rules proposed by CompTel are similar in design and intent to the Commission's previous holdings in the Computer Inquiry proceedings; those rules would ensure that the facilities used by incumbent cable operators to provide telecommunications and/or information services to the public are made available to unaffiliated providers on reasonable and non-discriminatory terms. Whether this is called "unbundling" or "open access," the result is the same, namely, to ensure that these facilities are integrated into the national infrastructure available to all providers of information and telecommunications services.

CompTel's proposed rules also are consistent with the decisions of federal courts that have addressed similar issues. For example, in *AT&T Corp. v. City of Portland*, the United States Court of Appeals for the Ninth Circuit ruled that Internet access is not a "cable service" as defined in the Act, but rather a combination of two separate services as defined in the Act:[87]

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85 *Id.* at 11530, ¶ 60.

86 *Independent Data Communications Mfrs. Ass'n, Inc.*, 10 FCC Rcd 13717, 13719, ¶ 13 (1995) ("*Frame Relay Order*").

87 *AT&T Corp. v. City of Portland*, 216 F.3d at 877 ("Under the statute, Internet access for most users consists of two separate services.")

"information services"[88] and "telecommunications services."[89] The court concluded that because the "cable broadband transmission" component of @Home's Internet access service is a "telecommunications service," Portland may not regulate AT&T's provision of @Home in its capacity as a franchising authority.

Similarly, the United States District Court for the Eastern District of Virginia ruled in *MediaOne Group, Inc. v. County of Henrico, Virginia* that cable modem platforms which "provide transmission between the points selected by requesting ISPs and their customers, without change in content" are providing "telecommunications services."[90] As the FCC correctly observed in the *Notice of Inquiry*, however, the court also ruled that MediaOne's RoadRunner service is a "cable service" under the Act.[91] This ruling is inconsistent with the court's conclusion that cable modem platforms provide telecommunications services, because the definitions of "cable service" and "telecommunications service" are mutually exclusive, as explained above. Perhaps more importantly, the ruling is also inconsistent with its recognition that MediaOne's Road Runner service is "a two-way interactive offering," which is explicitly excluded from the statutory definition of "cable services."[92] Therefore, CompTel respectfully submits that the court erred when it concluded that MediaOne's Road Runner service is a "cable service" under the Act. Until that issue is resolved on appeal, the Commission can and should

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88 *Id.* ("[T]he FCC considers ISP itself as providing 'information services' under the Act . . ..")

89 *Id.* ("[T]o the extent that @Home provides its subscribers Internet *transmission* over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.") (emphasis added).

90 *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 714 (E.D. Va. 2000), *appeal pending*, 4th Cir. No. 00-1680.

91 *Id.* at 715.

92 Specifically, although the statutory definition of "cable services" includes subscriber interaction required for use of one-way video programming or other programming services, it excludes all two-way services that allow the subscriber to transmit as well as receive video or other programming, as does MediaOne's RoadRunner service.

require incumbent cable operators such as MediaOne to unbundle the underlying telecommunications used to furnish Internet access services, particularly given the court's ruling that cable modem platforms which "provide transmission between the points selected by requesting ISPs and their customers, without change in content" are providing "telecommunications services."

Finally, the United States Court of Appeals for the Eleventh Circuit in *Gulf Power Co. v. FCC* affirmed the FCC's conclusion that "Internet service providers themselves provide information services."[93] Based on this conclusion, the Eleventh Circuit ruled that the FCC does not have authority to regulate pole attachments for the services that Internet service providers offer, because the Act only authorizes the FCC to regulate pole attachments for cable and telecommunications services, not information services. The court did not address the question of whether incumbent operators of cable modem platforms that offer their subscribers Internet access must unbundle the underlying telecommunications used to furnish the information service. Indeed, this issue was not before the Eleventh Circuit. However, its conclusion that Internet access is an information service is consistent with the analysis that CompTel sets forth here.

B. The Commission Has Title I Authority To Adopt Minimum Open Access Requirements for Incumbent Operators of Cable Modem Platforms.

According to the Supreme Court, the Commission has broad discretion to adopt rules governing incumbent cable systems that are "reasonably ancillary to the effective performance of the Commission's various responsibilities."[94] Title I establishes the Commission's authority to adopt rules governing entities that do not qualify as common carriers

93 *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000).

94 *United States v. Southwestern Cable*, 392 U.S. 157, 178 (1968).

to carry out its Title II responsibilities. Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[95] Section 201(b) states that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[96]

As noted above, the Commission previously has used its Title I ancillary jurisdiction to promote statutory objectives in similar circumstances. In the *Second Computer Inquiry* proceeding, the Commission distinguished basic services (which are subject to Title II) from enhanced services (which are not included within Title II). The Commission used its Title I ancillary authority to require carriers providing enhanced services over their own transmission facilities to unbundle the underlying transmission capacity by offering it to other providers of enhanced services on non-discriminatory terms as a basic common carrier service under tariff.[97] Alternatively, the Commission guaranteed that underlying transmission capacity would effectively be unbundled by requiring certain facilities-based enhanced service providers to offer enhanced services through a structurally separate subsidiary.[98] The Commission justified these rulings as necessary to prevent dominant local exchange carriers from inflating their rates for services regulated under Title II as a means of cross-subsidizing their enhanced service offerings. In this way, the Commission tied its exercise of Title I ancillary jurisdiction to "ensur[ing] the achievement of our statutory responsibilities."[99]

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95 47 U.S.C. § 154(i).

96 47 U.S.C. § 201(b).

97 *Computer II*, 77 FCC 2d at 475.

98 *Id*.

99 *Audio Communications, Inc. Petition for a Declaratory Ruling that the 900 Service Guidelines of US Sprint Communications Co. Violate Section 201(a) and 202(a) of the Communications Act*, 8 FCC Rcd 8697, ¶ 23 (1993)(quoting *PSC of Maryland*, 4 FCC Rcd at 4005).

The Commission has Title I ancillary jurisdiction to adopt minimum open access requirements because they would implement the Commission's statutory responsibilities under Title II. In particular, open access requirements would create more robust competition in the telecommunications wholesale market, thereby resulting in lower rates, more service choices, and technological innovation among the classes of carriers and services regulated under Title II. This would be true for all types of common carrier services, ranging from long distance services to the telecommunications services which afford citizens access to the Internet and other information resources. As such, open access requirements are reasonably ancillary to the Commission's statutory duty to ensure that rates and practices among common carriers are just, reasonable, and non-discriminatory.[100]

In addition, the Commission has ancillary Title I jurisdiction to adopt open access requirements as part of its statutory responsibility to implement the critical market-opening provisions in Section 251(c). Given that incumbent cable modem platform loops are one of only two telecommunications wires into tens of millions of homes and businesses, cable open access will impose greater market pressures on incumbent LECs in complying with the market-opening provisions of Section 251(c). Incumbent LECs that are slow or unresponsive in making the necessary facilities or services available to new entrants will risk losing significant customers and revenues to alternative cable modem platforms. By creating a structure of incentives to ensure that incumbent LECs and incumbent cable systems compete aggressively against each other for the business of new market entrants, open access requirements fall within the Commission's ancillary Title I jurisdiction.

Lastly, it is significant that open access requirements would promote numerous other statutory goals. Certainly, there can be no doubt that these requirements would promote

[100] 47 U.S.C. §§ 201(b), 202(a).

significantly the FCC's fundamental goal of regulating "so as to make available … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[101] Further, Congress made it a priority for the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by utilizing … measures that promote competition in the local telecommunications market."[102] Particularly for subscribers who earn low incomes or live in rural areas, enabling multiple providers of telecommunications and information services to utilize an incumbent cable system's local loop is critical to achieving Congress' goals. Although Section 706 and similar directives do not constitute an independent grant of authority to the Commission, the Commission can and should take such directives into account in deciding to adopt open access requirements in order to fulfill its Title II responsibilities to promote the public interest.

C. The Commission Has Title II Authority To Adopt Open Access Requirements for Incumbent Operators of Cable Modem Platforms.

CompTel submits that the Commission can reasonably construe the statutory term "telecommunications carrier" to include an incumbent operator of a cable modem platform that offers telecommunications services to its subscribers.[103] These incumbent operators are "telecommunications carriers," and thus they are required by Section 251(a)(1) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[104] The Commission has ample rulemaking authority under Section 201(b) to adopt minimum open

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101 47 U.S.C. § 151.

102 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 153(a).

103 47 U.S.C. § 153(44).

104 47 U.S.C. § 251(a)(1).

access requirements for incumbent operators of cable modem platforms that provide "telecommunications services" to implement the interconnection duty in Section 251(a).

Further, CompTel submits that the Commission can reasonably construe the statutory term "telecommunications carrier" to include incumbent operators of cable modem platforms that offer only information services to their subscribers. The Commission has held, and the Ninth Circuit has affirmed, that information services are provided over facilities that qualify as "telecommunications."[105] The Commission could therefore conclude that an incumbent operator of a cable modem platform offers telecommunications for a fee directly to the public when it offers information services for a fee directly to the public.[106] Under this interpretation, incumbent operators of cable modem platforms that provide telecommunications or information services are "telecommunications carriers" and thus are subject to, among other things, the interconnection duty specified in Section 251(a)(1).

Wholly apart from its authority to construe the relevant statutory terms, the Commission has the authority to impose a legal requirement upon incumbent cable systems that have upgraded or installed networks with a telecommunications capability to offer basic transmission capacity as a "telecommunications service."[107] In exercising that authority in the past, the Commission has focused on whether sufficient common carrier facilities are available in

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105 *See, e.g., GTE Telephone Operating Cos.; GTOC Tariff No. 1 GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶¶ 20, 26 (1998).

106 As a matter of economics, for cable subscribers that receive information services from their cable operator (whether alone or in conjunction with cable television services), a portion of the fee charged to the information services customer reflects the costs (including profit) of providing telecommunications to the customer.

107 *See, e.g., NARUC I*, 525 F.2d 630 at n.76; *Cable & Wireless, PLC*, 12 FCC Rcd 8516, n.61 (1997) ("We note that the Commission has the authority to require such a change in regulatory status to common carrier."); *Optel Communications, Inc.*, 8 FCC Rcd 2267, 2269 n.15 (1993); *Norlight*, 2 FCC Rcd 5167, 5168, ¶ 15 (1987).

the market and, where such facilities are not adequate, the Commission has found that the public interest requires these facilities to be offered on a common carrier basis.[108]

The record supports the conclusion there is not sufficient last-mile broadband capacity available today. For many subscribers, the incumbent cable operator will be the only possible provider of broadband services for the foreseeable future. Therefore, the Commission can exercise its authority to require all incumbent operators of cable modem platforms offering "information services" to provide the underlying "telecommunications" component as a "telecommunications service" in order to break the control that these incumbent operators have over bottleneck last-mile broadband facilities.

Imposition of Title II regulations upon incumbent operators of cable modem platforms is particularly justified given the benefits those operators have extracted from their status as monopoly cable television operators. The common carrier concept developed as a *quid-pro-quo* whereby a carrier was made to bear a special burden of care in exchange for the privilege of soliciting the public's business.[109] Thus, the Commission would have ample equitable as well as empirical grounds to rule that the public interest would be served, and the goals of the Act best achieved, by regulating non-cable services provided through incumbent cable facilities under Title II. Further, by imposing a legal requirement upon *all* incumbent cable systems to operate on a common carrier basis for the provision of telecommunications and information services, the Commission would avoid the need to undertake a time-consuming, case-by-case analysis of whether individual cable systems qualify as common carriers under the statute.

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108 *See, e.g., Cable & Wireless, PLC*, 12 FCC Rcd 8516 (1997).

109 *NARUC II*, 525 F.2d 630, 642 (1976).

The Commission should not be concerned that finding incumbent operators of cable modem platforms to be "telecommunications carriers" will impose unnecessary legal requirements upon incumbent cable systems. Congress gave the Commission authority in Section 10 of the 1996 Act to forbear from implementing or applying statutory requirements to promote the public interest. As a result, if the Commission believes that classifying incumbent operators of cable modem platforms as "telecommunications carriers" would bring with it too much regulatory baggage, the Commission has authority through its Section 10 powers – and CompTel supports the use of those powers – to tailor the rules it adopts to ensure that incumbent cable operators are not hampered by requirements that have no nexus with the overriding goal of promoting the consumers' interest in last-mile broadband competition.

CONCLUSION

CompTel respectfully submits that the Commission should promptly commence the rulemaking proceeding described herein.

Respectfully submitted,

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DATED: December 1, 2000

CERTIFICATE OF SERVICE

I, Theresa A. Baum, hereby certify that I have caused a copy of the foregoing "Comments of the Competitive Telecommunications Association," to be served on this 1st day of December 2000, via hand delivery, upon the following:

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